

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





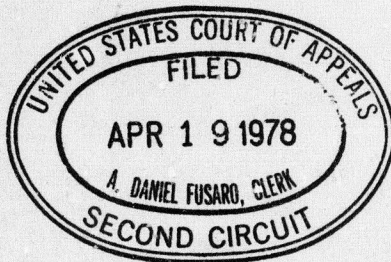
77-6166

IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

CARROLL BARNETT, HAROLD MCBRINE,  
on behalf of themselves and all  
others similarly situated,  
Plaintiff-Appellees

v.

JOSEPH A. CALIFANO, JR.,  
Secretary of Health, Education,  
and Welfare,  
Defendant-Appellant



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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
OF THE DISTRICT OF VERMONT

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BRIEF OF APPELLEES

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ISSUES PRESENTED FOR  
REVIEW

1. Whether the District Court erred in finding jurisdiction to decide this case, and certifying this case as a class action?

2. Whether the District Court erred in finding a violation of the Social Security Act and the Administrative Procedure Act in the circumstances of this case?

3. Whether the District Court abused its discretion in issuing the Judgment Order that it did?

STATEMENT OF THE CASE

Plaintiffs are satisfied with the defendant's statement of the case and thus will not elaborate further on that. Plaintiffs have compiled as Exhibits several cases that are not reported, and these are submitted along with this Brief for the Court's reference.

STATEMENT OF FACTS

A brief statement of the most relevant facts will be included here since they are included only by reference in defendant's Brief. The heart of this case involves the delay between the request for a hearing by an applicant for S.S.I. disability benefits, and the actual date that the hearing is held. The hearing level is the third step in the administrative appeals process of the Social Security Administration. 20 CFR §416.1425. At the time of the hearing on the merits of this



case, the facts showed that the delays between request and hearing dates for the named plaintiffs and intervenors ranged from 3 to 13 months, and data comparing request dates with hearing dates in Vermont for the 100 hearings that had been held disclosed delays ranging from 1 month to 11 months. App. 102. At the time of the hearing in this case, the defendant had supplied additional data indicating progress toward alleviating delays, yet it was apparent at the time the District Court issued its Opinion (February 22, 1977), that the defendant had not met plaintiffs' demand that all hearings be held within 90 days of request, and the District Court so found. App. 102.

The defendant had stated it was his objective to hold all S.S.I. disability hearings within 100 days of request by September 30, 1976, and to reduce the delay to 90 days by the end of 1977. However, as the District Court found, the defendant had retreated from this position and at the time of final hearing below had declined to predict when this objective would be met. App. 102. As the District Court also found, at oral argument counsel for the defendant further retrenched by portraying the 90 day objective as an aspiration, but not necessarily an attainable goal.

The causes for the delays were portrayed as being 1) the rapidly increasing number of claims; 2) difficulties encountered in appointing additional hearing officers, and 3) the nature of the disability inquiry itself. App. 103. The defendant had taken some steps to remedy the situation, including increasing



staff and using improved equipment and techniques to increase productivity. App. 103. Congress has also focused considerable attention on the problem, and passed limited remedial legislation reclassifying certain hearing officers so that they could hear concurrent S.S.I. and Title II cases. App. 103.

It was with this set of undisputed facts that the District Court issued its Opinion and Judgment, and these are the facts upon which review must be based, and not upon any subsequently discovered facts.

#### ARGUMENT

1. THE DISTRICT COURT PROPERLY ASSUMED JURISDICTION OF THIS CASE, AND PROPERLY CERTIFIED THIS CASE AS A CLASS ACTION.

The defendant, in his Brief, recognizes as he must, that this case is to a large extent controlled by this Court's decision in White v. Mathews, 559 F.2d 852 (2 Cir. 1977) cert. denied 46 U.S.L.W. 3539 (1978). He attempts to make various distinctions between this case and White, and this will be dealt with shortly, but plaintiffs submit that this case is largely indistinguishable from White, and White is dispositive of most of the points raised.

This is most true on the issue of jurisdiction and class certification. The District Court found jurisdiction under both 28 U.S.C. §1361, and under 42 U.S.C. §405(g). As to §1361, this Court has already answered the defendant's objections which are that 42 U.S.C. §405(g) and (h) provide the only basis for review, and has found §1361 to be an appropriate basis for jurisdiction. In White it was stated:

"This action, on the other hand, does not affect



the merits of the underlying statutory issue-whether claimants in White's class are entitled to benefits - that will ultimately be subjected to the administrative process. Here, the district court was asked merely to require the agency to conduct its proceedings with reasonable speed...Under these circumstances, we follow Frost and hold that the district court properly predicated jurisdiction on §1361." Id at 856

The District Court here followed identical reasoning in finding §1361 jurisdiction and this finding should be affirmed. See also, Caswell v. Califano, 435 F. Supp. 127 (D. Me. 1977) appeal pending; Etier v. Califano, No. 77-0520-WI-10 (N.D. Cal. 1978); Wright v. Califano, No. 75 - C-1537 (N.D. Ill. 1977) appeal pending; Mathews v. Blankenship, No. 75-0185L(A) (W.D. Ky. 1976), appeal pending.

However, here the District Court found an additional ground of jurisdiction to exist under 42 U.S.C. §405(g). Since the Court in White found jurisdiction under §1361 it stated that it was unnecessary to consider §405(g). Here, it is similarly unnecessary to consider 405(g) if §1361 provides jurisdiction, but 405(g) jurisdiction will be briefly reviewed. In determining whether 405(g) jurisdiction exists, the case of Mathews v. Eldridge, 424 U.S. 319 (1976) must be analyzed. There, the Supreme Court found jurisdiction under 405(g) in a case challenging the termination of Social Security benefits without a prior hearing. As to jurisdiction under §405(g), Mathews teaches:

"Implicit in Salfi, however, is the principle that this condition [a final decision after a hearing] consists of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be 'waived' by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted.



The nonwaivable element is the requirement that a claim for benefits shall have been presented by the Secretary. Absent such a claim there can be no 'decision' of any type."  
424 U.S. at 328.

The District Court found this case to parallel Eldridge as to the nonwaivable element, as all plaintiffs and the defined class have made claims for benefits. App. 120. The District Court similarly found this case to parallel Eldridge as to the waivable element, that being the failure to exhaust administrative remedies. Eldridge held that:

"...cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." Id at 330

Here, the District Court properly found the statutory and constitutional issues collateral to the substantive claim of entitlement, and properly reasoned that exhaustion is futile as full relief could not be obtained by awaiting a final decision from the Secretary. App. 120.

Thus, it is submitted that §405(g) is another appropriate base for jurisdiction. See also, Caswell v. Califano, supra, at 133.

Turning to the question of class certification, the District Court certified a class to consist of "... all present and future applicants for S.S.I. disability benefits whose initial claims are denied on a finding that no disability exists and who subsequently request a reconsideration hearing." App. 59-60. The defendant very briefly tries to argue against class



certification, arguing that the plaintiff's claims are not typical of the class, and that the plaintiffs are not necessarily representative of the class. Brief at 43-44. However, the class certified in White was defined substantially similar to this class, and in White the Court held:

"However, plaintiffs all seek social security disability benefits through the identical administrative process, all have requested hearings after initial adverse rulings, and all have endured long delays before hearing."  
Id at 858

The same is true here, and thus it is submitted that a class action was properly certified here.

2. THE DISTRICT COURT PROPERLY FOUND A VIOLATION OF THE SOCIAL SECURITY ACT AND THE ADMINISTRATIVE PROCEDURE ACT.

Turning to the merits of the case, the District Court found the delays in holding S.S.I. disability hearings were unreasonable, App. 108, and thus that both the Social Security Act, and the Administrative Procedure Act were violated. App. 113. Here, it is necessary to examine the one real difference between this case and White, and that is that this case involved applications for disability benefits under the S.S.I. program, 42 U.S.C. §1381 et seq. while White involved applications for disability benefits under the Disability Insurance program, Title II of the Act. At this point, the difference, if any, in the statutory provisions regarding the holding of hearings must be analyzed. The administrative appeals process for S.S.I. is identical to that for Title II benefits, i.e. initial determinations, reconsiderations, hearings. Similarly, the definition



of disability for both programs is identical, as are the procedures for judicial review. The relevant statutory provision under the S.S.I. program for hearings is found at 42 U.S.C. §1383(c) where it is provided:

"1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this title. The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this title with respect to eligibility of such individual for benefits..."

The comparable statute for the Title II program is found at 42 U.S.C. §405(h), and it is identical with the requirement of "...reasonable notice and opportunity for a hearing..." Thus, on the statutory claim under the Social Security Act plaintiffs submit that there is no difference between the SSI program and the Title II program.

In White, the Court interpreted 42 U.S.C. §405(h) as follows:

"We read this as giving the claimant a right to a hearing within a reasonable time..."  
Id at 858.

The identical holding must apply to 42 U.S.C. §1383(c), making the question of reasonableness the key to the case.

As in White, the defendant here argues that the Social Security Act does not contain any certain time limit within which to hold hearings and points to 42 U.S.C. §1383(c)(2) which requires that a decision be rendered within 90 days after a hearing request except in those cases involving a disability



issue. The defendant then goes on to argue that what is reasonable depends on the circumstances of the case, and points out the reasons for the delay, and efforts and progress made to cope with the problem.

On these points, the District Court recognized that the Social Security Act did not have a set time limit within which to hold disability hearings, yet reasoned:

"Although Congress did not see fit to apply the 90 day request to decision time limit of 42 U.S.C. §1383(c)(2) to disability cases, this does not completely gainsay the concern of Congress that hearings be held within a reasonable time. Concern with unreasonable delays is clearly evidenced by the enactment of Pub. L. No. 94-202, which is intended to alleviate the delay problem, and by the Congressional discussion that lead to that act... More importantly, the lack of an express time limit cannot alter the statutory requirement that an applicant be afforded a reasonable opportunity for a hearing. The lack of a maximum time limit does not mean that any delay is reasonable. In fact, the various statements of the parties indicate that 90 days from request to hearing is a reasonable time. Indeed, the specific 90 day request to decision time limit in nondisability cases, 42 U.S.C. §1383(c)(2), gives some indication that 90 days between request and hearing is not unreasonable for disability claims, despite the relatively more complex nature of the latter." App. 106.

This very persuasive reasoning is similar to that of this Court in White. There the Court noted the absence of any time limit in the statute, and noted the same defenses raised by the Secretary, i.e. that there are very severe problems that the Secretary is trying to deal with and that Congress did not impose new time limits when debating the issue. The basic arguments here are the same as in White. Yet, the



Court concluded in White:

"Congress did not abandon the requirement of reasonableness, and the decision not to impose precise limits should not be interpreted as an endorsement of the delays. SSA Commissioner James B. Cardwell had represented to Congress that by June 1977 hearing delays would not exceed 90 days. The district court's imposition of a time schedule that allowed the SSA from 90 to 30 days longer than its own projection is hardly at odds with the expectations of Congress." Id at 859-860.

Similar reasoning applies here. What the defendant is asking, in essence, is that he be allowed to determine what is reasonable without any judicial intervention. Yet this cannot be allowed in light of the admittedly "glacial" pace of the SSA. The defendant, in his Brief, appears to directly contradict himself, in trying to distinguish this case from White regarding the 'different factual context'. On pages 22-23 of his Brief he indicates that by January 1977, a month before the District Court's decision, the hearing situation had improved dramatically in Vermont, noting that hearings at that time were being held in 'around 120 days'. He then notes that a court order was not necessary, as the Secretary was progressing.

However, the facts that the court was presented with showed delays for the named plaintiffs ranging from 3-13 months. This is very comparable to the average delay found in White of 211.8 days. Id. at 855. Moreover, it is clear that the delays in January, 1977, were still over 120 days, and plaintiffs were requesting, and the District Court ordered hearings within 90 days. Most significantly, the defendant admitted that many hearings in Vermont were expedited due to the lawsuit, App. 83,



and in his Memorandum indicates the obvious, i.e. that where lawsuits are filed and court orders issued, the Secretary diverts resources from other jurisdictions to meet the problem in the court-order jurisdictions. In an affidavit provided on January 17, 1977, it is indicated that a special detail of judges was assigned to Region I, which included Vermont, to deal with the delay problem.

Thus, while the defendant, on the one hand, points out the undesirability of court orders as it diverts resources to the court order jurisdictions, this also shows, on the other hand, that were it not for the order in this case the delays would still be much longer. Thus the argument that the facts in Vermont show an improvement so that an order was not necessary is clearly untenable, as the defendant admits that a key reason for the improvement was the lawsuit and anticipation of a court order.

On this point, plaintiffs would point out that the Secretary had many years to deal with this problem before courts got involved. The defendant's own materials indicate a growing problem as of 1969, when the Black Lung program was initiated, Appellants Exhibit to Brief, 8, and the earliest court orders came in 1976-1978. Clearly, nothing significant was being accomplished before the courts were drawn into the fray, and only now that court orders are being issued is significant progress being seen. Rather than chastising courts for their 'piecemeal' approach to the problem as the defendant does, it



is suggested that courts can rightfully take credit for hastening the 'glacial' pace of the SSA.

A final contradiction that the defendant exhibits when he tries to distinguish Vermont's factual context to avoid an order, is that for most of the Brief he declares the problem to be a national problem, see p. 37, and yet he then tries to say that Vermont is different and the problem was being solved there, and thus no order was necessary.

Thus, it is submitted, that the facts that the District Court found show unreasonable delays, just as the facts in White showed unreasonable delays. As against the defendant's arguments that the situation in Vermont had improved, we have the facts, as found by the District Court, that although the defendant had originally stated his objective of reducing delays to 90 days by the end of 1977, by the time of the District Court's decision in this case, he had retreated from this position and declined to predict when that objective would be met, and at oral argument in the District Court, counsel for defendant further retrenched by portraying the 90 day objective as an aspiration but not necessarily an attainable goal. App. 102; 94. For this reason, the defendant's argument that Barnett is distinguishable from White due to a different factual context must be rejected.

It is clear that each case must be judged on its own facts, and even though the delays in this case are comparable to the delays in White, there is another difference relating



to the different programs, i.e. S.S.I. as against Title II, that must be assessed. Defendant asserts that since White dealt with Title II benefits, and thus with some type of 'contractual' rights, and since this case dealt with S.S.I. (welfare) benefits, that White should not control.

Plaintiffs admit the difference in programs, but suggest that this makes this an even stronger case and one in which even stricter time limits are needed. The basis for this is that this case involves S.S.I. applicants, who, by definition are destitute. In White the Court recognized the hardships faced by disability applicants, and their typically modest resources, and noted that delays exacerbated the hardships and that this is one factor to consider in determining what is a reasonable length of time within which to hold hearings. Id at 858-859.

However, S.S.I. applicants are disabled persons applying for welfare (S.S.I. is the federalization of the former state welfare program for the Aged, Blind, and Disabled), and thus, unlike applicants for Title II, they never have any resources to fall back upon. The U. S. Supreme Court recognized those differences in Mathews v. Eldridge, 424 U.S. 319 (1976), and Goldberg v. Kelly, 397 U.S. 254 (1970), and these two cases bear analysis, as they relate to each other in this respect the same way that White relates to this case, i.e. White dealt with the Title II program and this case deals with a welfare program.

Both Eldridge and Goldberg dealt with the question



of whether a pre-termination hearing was needed before benefits were terminated, and in Eldridge the answer was no, while in Goldberg the answer was yes. In distinguishing Goldberg, the Court in Eldridge noted "...that welfare assistance is given to persons on the very margin of subsistence..." Id at 340, while:

"Eligibility for disability benefits, in contrast, is not based upon financial need...As Goldberg illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of the administrative decisionmaking process. The potential deprivation here is generally likely to be less than in Goldberg, although the degree of difference can be overstated."

Id at 340-341.

Thus, although Eldridge and Goldberg dealt with due process issues, the fact that Eldridge recognized that welfare recipients are in a more desperate plight than Title II recipients has a direct bearing here on determining the reasonableness of the administrative delay. Here the plaintiff class is composed of persons suffering the same 'brutal need' that the class in Goldberg suffered, so it is submitted that the fact that this is a welfare program and not an insurance program as Title II is, only increases the need for speed in the administrative process.

The defendant points out that a person already getting S.S.I. does have a pretermination hearing as in Goldberg (in fact, Goldberg would require one), and seeks to distinguish this case by saying the class is made up only of applicants for benefits. Yet, it is clear that plaintiffs here do have a property interest in their S.S.I. benefits, as they have a legitimate claim of statutory entitlement and are seeking statutory benefits, see



Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1974), and thus this interest is protected by the statute as well as the constitution, and the question again becomes what is a reasonable length of time for a welfare applicant to await a hearing on his claim. See also, Etier v. Califano, supra., Blankenship v. Mathews, supra.

Thus, for the same basic reasons that this Court found in White, it is submitted the long delays found here led the District Court to properly conclude that the Secretary violated the Social Security Act. See also, Caswell v. Califano, supra., Etier v. Califano, supra., Wright v. Califano, supra., Mathews v. Blankenship, supra.

The District Court here also found that these delays violated the Administrative Procedure Act. The Court did not reach this question in White, as it held that the Social Security Act was violated. Id at 861 n. 12. Similarly, the A.P.A. question need not be reached here if this Court upholds the District Court's finding that the Social Security Act was violated.

However, the A.P.A. question will be briefed, to the extent that it differs from the Social Security Act question.

The A.P.A. provides:

"With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."  
5 U.S.C. §555(b).

The A.P.A. also mandates that the reviewing court shall "... compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §706(1).



In discussing the A.P.A. the District Court noted that:

"...Congress has specifically invested the courts with the authority and the duty to prevent unreasonable delay in an agency's processes. When an agency acts outside the scope of its statutory authority, such as by delaying a hearing for an unreasonable length of time, then the courts have the authority and the duty to act to remedy the situation. F.C.C. v. Pottersville Broadcasting Co., supra., 309 U.S. at 144-45; Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 861, 62 (4 Cir. 1961), and cases cited thereat." App. 105-106

Thus, the District Court concluded that "the plaintiffs have been subjected to unreasonable delays encountered between the time when a hearing is requested and the time when the hearing occurs...", App. 108, and it held that this violated the previously cited sections of the A.P.A. as well as the Social Security Act. App. 113.

It is clear that the issue of 'reasonableness' is the cornerstone of both the A.P.A. claim, as well as the Social Security Act claim and the District Court treated the issues similarly. The defendant in his Brief notes that the 'reasonable time' standard applies equally to the A.P.A. as well as to the Social Security Act. Brief at 19. Thus, all of the previously cited arguments going to the facts supporting the District Court's finding that the plaintiffs suffered unreasonable delays apply to the A.P.A. claim and need not be repeated here.

The previous discussion of the fact that the plaintiff class here consists of applicants for welfare benefits, and thus that the greatest possible speed is necessary in providing hearings is equally applicable to the A.P.A. claim, since 5 U.S.C. §555(b)



specifically provides that "With due regard for the convenience and necessity of the parties...", (emphasis added) agency action shall be concluded. Since the defendant raises the same basic arguments here on the reasonableness issue, i.e. reasons for the delays, progress made, etc., this Court's analysis in White applies equally to the A.P.A. claim, as does this Court's conclusion in White that "...we do not believe that these difficulties [cited by the defendant] establish that claimants in White's class have been given a reasonable...opportunity for a hearing." Id at 859.

Thus, it is submitted that the District Court's finding that the A.P.A. was violated by the unreasonable delays in holding hearings is supported by substantial evidence and should also be affirmed. See also Caswell v. Califano, supra.; Blankenship v. Mathews, supra; Wright v. Califano, supra.

3. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING ITS JUDGMENT ORDER.

Having established that the District Court's findings, amply supported by substantial evidence, that the unreasonable delays in this case violate both the Social Security Act and the A.P.A, the final question becomes whether the District Court in any way abused its discretion in framing the equitable relief that it did in its Judgment Order. In White, the Court approved the District Court's order, recognizing the broad discretion given to a court in fashioning equitable and remedial relief to an existing problem. Id at 860. It is well established case law that there



are very broad limits within which a court can fashion equitable relief. In Porter v. Warner Co., 328 U.S. 395 (1945) it was held:

"Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.. Power is thereby resident in the District Court in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case."  
Id at 398.

Similarly, in Mitchell v. DeMario Jewelry, 361 U.S. 288 (1959) it was stated:

"When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic powers of equity to provide complete relief in light of the statutory purposes..." Id at 291-292.

See, also, Hecht v. Bowles, 321 U.S. 321, 329-330 (1944). Thus, with this broad standard of review we turn to examine the actual relief ordered by the District Court.

The basic relief was ordering the defendant to hold hearings within 120 days of the request therefor by July 1, 1977, and to reduce the time to 90 days by January 1, 1978. If hearings were not held within those time limits, the District Court ordered the payment of prospective non-refundable benefits to such claimants, these payments to begin the first month after the month in which the maximum time period is exceeded, and to end in the month in which a decision is written on the claim which denies the claim. Finally, the District Court provided for exceptions to the time limits in cases in which a) the claimant or his representative causes a delay by failure to provide necessary information; b) the claimant or his representative request a delay; c) the claimant



or his representative fails to appear for a hearing; or d) other action or omission directly attributable to the claimant or his representative. The order also provided that any benefits payable under the order would be suspended if the claimant refuses to cooperate in attending a hearing or in going to a consultative examination as deemed necessary by the administrative law judge or in obtaining any other necessary evidence.

In comparing this order to the District Court's order in White, the first and very significant thing to note is that this order only sets time limits for the actual holding of the hearing, while the White order sets limits for both holding the hearing and writing a decision. Although it is impossible to calculate how long it will take in each case to issue a decision after a hearing is held, particularly if additional consultative medical examinations are held, it would seem reasonable to conclude that an average addition of 30 days or more would be required. See, Final Report of Center for Administrative Justice, 175-180; Report of Comptroller General, 15; Deposition of Robert C. Hermann, 35-36.

Thus, as to the actual time limits, the White court ordered all decisions to be made within 180 days of request for hearing by December 31, 1977; 150 days of request for hearing by July 1, 1978; and 120 days of request for hearing after July 1, 1978. Thus, the final result in this case was to have all hearings held within 90 days by January 1, 1978, while the final result in White, which is almost now upon us, was to have all hearings held and



decisions written within 120 days by July 1, 1978. When one considers all of the things that may have to go into writing a decision, it would appear that a requirement to hold a hearing and write a decision within 120 days is a more onerous requirement than to simply hold a hearing within 90 days.

The fact that the order here only deals with the holding of the hearing, and not the writing of the decision is significant in several ways. First, the S.S.I. statute at 42 U.S.C. §1383(c)(2) imposes a 90 day time limit from hearing request to decision in non-disability cases. Thus, as the District Court noted, this gives some indication that 90 days between request and hearing is not unreasonable for disability claims. App. 108. Moreover, the defendant spends a great deal of time discussing the relative complexity of the disability case, and the need for gathering additional medical evidence after a hearing. In fact, in the deposition of Robert L. Hermann, the Chief Administrative Law Judge for the region including Vermont, it is indicated that in many cases, somewhere between 80% or 90% of his cases he has to request additional medical examinations after the hearing. Deposition of Robert L. Hermann at 35. Additionally, the exclusion in the S.S.I. statute of disability cases from the 90 day time limit for decisions also recognizes the relative complexity of writing a decision in a disability case.

Thus, the fact that this order only deals with the holding of the hearing, and not the writing of the decision, takes a great deal away from the defendant's arguments. The



defendant notes that the White order allows a post-hearing exception when the ALJ determines that an additional medical examination is needed. Brief at 26-27. Yet, the order here does not impose any requirement whatsoever on what happens after the hearing is held, in terms of gathering additional evidence, or writing the decision.

The defendant also argues that the effect of this order would be to sacrifice quality of adjudication to quantity, and argues that accuracy should have priority over speed. Brief at 39-40. Yet, once again, this order does not impose any limits on the writing of the decision or the gathering of additional evidence, and thus does not pose any threat to the 'quality' of decision-making. This order deals strictly with the mostly ministerial function of actually holding a hearing, and does not concern itself directly with the writing of a decision. The only reason that hearings cannot be held within a reasonable time right now is lack of manpower, and not the complexity of the disability process. This is clearly illustrated in this case by the fact that when the S.S.I. hearing examiner in Vermont was only hearing S.S.I. cases, and not concurrent S.S.I. and Social Security cases, and thus he had no problems with sheer numbers of hearings, he could hold his hearings within 30 days to 6 weeks. App. 86. The District Court did not order the holding of hearings within this short time frame, although this evidence shows it can be done, and ordered instead that the defendant be given 90 days to hold the hearings.



Thus, it is submitted that all of the defendant's arguments regarding the complexity of the disability process is merely a smoke-screen, and this becomes readily apparent when the Secretary himself stated that his initial goal was to have all hearings held and decisions written within 90 days.

A final factor going to the 90 day limit imposed here, as compared to the 120 day limit in White is the previously mentioned fact that this case involves S.S.I. applicants and White involved Title II applicants. Since the class here is more destitute than the White class it is submitted that this would justify even more stringent time limits than in White.

Thus, as the Court noted in White, since SSA Commissioner James B. Cadwell had represented to Congress that by June, 1977 he hoped to have all decisions in S.S.I. and Title II cases written within 90 days of the request for a hearing, Id at 860 n. 10, it does not seem unreasonable, nor an abuse of equitable discretion to now order the defendant to at least hold their hearings within 90 days. As the District Court in Blankenship v. Mathews, supra, noted, since the defendant had stated he would be able to hold all hearings within 90 days, "... we hold that he should be compelled to adhere to that statement..." Id. If the situation in Vermont was progressing as smoothly as the defendant indicated in his Brief at 22-23, then he should not complain about being compelled to live up to his commitments.

Turning briefly to review what other courts have ordered in terms of the actual time limits, in Mathews v. Blankenship,



supra, which was a case involving both Title II benefits and S.S.I., the District Court ordered that hearings be held within 90 days of the date of request by February 1, 1977. In Caswell v. Califano, supra, which involved Title II benefits, the court ordered hearings to be held within 120 days of the date of request by December 31, 1977, and to be held within 90 days by July 1, 1978. In Etier v. Califano, supra., which was an S.S.I. case, the court ordered hearings within 180 days by June 30, 1978, decision within 30 days thereafter. Every six months the time limits are reduced by 30 days, until by January 1, 1980 the Secretary must hold hearings within 90 days and render decisions 30 days thereafter. Finally, in Wright v. Califano, which was a Title II case, the court ordered all decisions to be within 180 days of the hearing request by January 1, 1978, and within 120 days by July 1, 1978, and down to 90 days by January 1, 1979.

Thus the order here as to the actual time limits is well within the bounds set by other courts, and certainly within the District Court's equitable discretion in determining what would be reasonable in the State of Vermont.

The defendant attacks the proliferating number of court orders as unreasonable, and as 'piecemeal' approaches to a national problem. Brief at 37. Yet, as noted earlier, the defendant had many years to resolve the problem on his own without any judicial intervention and it is only now, with the proliferation of lawsuits and orders that substantial progress can be noted in the delay problem. The more orders that are entered, the more pressure for relief will be exerted on the Secretary, to the benefit of all of the persons applying for disability benefits. As this



Court quoted approvingly from the district court in White the question is

"...not whether there shall be costs incurred, but who shall bear them while the governmental machinery responsible for providing appeals puts itself in order." Id at 856.

For these reasons, the time limits established by the District Court here should not be disturbed.

The next significant part of the order here is the requirement that the defendant pay prospective non-refundable benefits to any claimants whose hearings are not held within the established time limits. In all respects except as to the non-refundable nature of the benefits, this order is identical to White, and thus should be affirmed at least as to the requirement that prospective benefits be paid.

The defendant raises the same arguments here as he did in White, as to whether the Social Security Act, or the doctrine of sovereign immunity bars the order to pay prospective benefits. As the Court noted in White:

"But the absence of a specific congressional provision does not bar the federal court's exercise of its remedial powers when it finds the Secretary has violated the statute."  
Id at 860

Clearly, it is within the equitable powers of the District Court to order the payment of benefits. The doctrine of sovereign immunity has no application here, as the order was not an award of money damages but merely, as the District Court noted, "...as an adjunct to its proper grant of equitable relief..." App. 123.

The only remaining issue here relates to the order that the benefits be paid be non-refundable. The defendant spends a



great deal of time on this point, see Brief at 29-35, yet to the plaintiffs this is an insignificant part of the order. The District Court has stayed that part of its order that make the benefits non-refundable so this Court could review that part of the order. App. 127.

In White, the court approved an order which allowed recoupment of any benefits paid under the order to persons who eventually were found not disabled. Here, the District Court added the provision that the benefits be non-refundable. Plaintiffs did not specifically request that the benefits paid be non-refundable, yet the District Court felt this was an appropriate part of its order.

Clearly, the District Court did not impute any ill-will to the Secretary. Perhaps the District Court felt that with S.S.I. applicants, who by definition live close to the brink of subsistence, the requirement that they repay benefits erroneously granted would be too onerous. In White, the Title II applicants might have more resources available to repay any overpayments. This issue involves a balancing of the competing demands here, and once again it is appropriate to note the language in White indicating that the question "...is not whether there shall be costs incurred, but who shall bear them while the governmental machinery responsible for providing appeals puts itself in order." Id at 859.

Here the balancing process is at its toughest, for we are here discussing claimants who are eventually found not disabled and thus not entitled to any statutory benefits. However, the purpose of the order is not to pay statutory benefits, but merely



to insure that the claimants' statutory rights to a hearing within a reasonable time is enforced. Thus, even if claimants are finally found not disabled, they would only have been paid benefits here if their statutory right to a hearing within a reasonable time was violated.

If the defendant complies with the court-ordered time limits, then no benefits will ever have to be paid to anybody. Thus defendant himself can control this aspect of the order. It is only as an adjunct to its equitable order that benefits were ordered, and balancing the equities of insuring a reasonable hearing to a welfare recipient against the expenditure of government funds, one can still conclude that the benefits should be non-refundable. Thus, it is submitted that even this part of the order, which is the only real difference from the White order, should be affirmed.

However, plaintiffs would not argue too strongly against deleting the provision that the benefits be non-refundable, and leaving the order as in White, with the SSA entitled to seek recoupment for any interim amounts paid. This would still adequately insure that hearings would be held in a timely fashion.

#### CONCLUSION

Thus, for the foregoing reasons, the decision of the District Court should be affirmed in all respects.

Respectfully submitted,

Dated: 4/12/78

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CERTIFICATE OF SERVICE

I, Zander B. Rubin, hereby certify that I forwarded a copy of the foregoing to the following, by mailing a copy thereof, first class mail, proper postage affixed, to the following address:

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